

Supreme Court, U. S.

FILED

SEP 26 1978

IN THE

Supreme Court of the United States

MICHAEL PODAK, JR., CLERK

October Term, 1977.

No. **78 - 518**

NACIREMA OPERATING CO. and
TRAVELERS INSURANCE CO.,

Petitioners,

v.

DOROTHY LYNN and DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES DE-
PARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RICHARD R. GALLI,
THOMAS E. BYRNE, JR.,
KRUSEN EVANS AND BYRNE,
21 South 12th Street,
Philadelphia, Pa. 19107

Counsel for Petitioners.

TABLE OF CONTENTS.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	7
APPENDIX:	
Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. § 909	A1
Decision and Order of U. S. Department of Labor, Office of Administrative Law Judges	A2
Decision of U. S. Department of Labor, Benefits Review Board	A7
Opinion of the U. S. Court of Appeals for the Third Circuit	A14
Order Denying Petition for Rehearing of the United States Court of Appeals for the Third Circuit	A19

IN THE
Supreme Court of the United States

TABLE OF CITATIONS.

Cases:	Page
Norfolk, Baltimore and Carolina Lines, Inc. v. Director, Office of Workers Compensation Programs, 539 F. 2d 378 (4th Cir. 1976), cert. denied, 429 U. S. 1078 (1977)	3, 4, 5
State Insurance Fund v. Pesce, 548 F. 2d 1112 (2d Cir. 1977)	4, 5
Usery v. Turner Elkhorn Mining Co., 428 U. S. 1 (1976)	4, 5, 6
 Statutes:	
Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. 92-576, 86 Stat. 1251	2, 5, 6
Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. § 901 et seq.):	
Generally	3
Section 9	2, 3, 5
Section 19(d)	3
 U. S. Constitution:	
Fifth Amendment	5
28 U. S. C. Section 1254(1)	2

OCTOBER TERM, 1977.

No.

NACIREMA OPERATING CO. AND TRAVELERS INSURANCE CO.,

Petitioners,

v.

DOROTHY LYNN AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on June 5, 1978.

OPINIONS BELOW.

The Opinion of the Court of Appeals is not yet reported. It affirmed the Order of the Benefits Review Board, BRB No. 77-225, which is reported at 6 BRBS 314 (1977).

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on June 5, 1978 and a petition for rehearing was denied on June 28, 1978. Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Whether the express language of Section 9 of the Longshoremen's and Harbor Workers' Compensation Act, as amended, requires the payment of death benefits to survivors of employees who were permanently disabled before the effective date of the 1972 Amendments?
2. Whether the legislative history of the 1972 Amendments to the Act reveals a clear intention that the maritime employer and its insurer were to bear the cost of death benefit payments to survivors of employees who were permanently disabled before the effective date of the Amendment?
3. Is Section 9 of the 1972 Longshoremen's and Harbor Workers' Compensation Act, as amended, constitutionally deficient as violative of the Due Process Clause of the Fifth Amendment and as beyond the admiralty jurisdiction of the Congress?

STATUTES INVOLVED.

The pertinent portions of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. 92-576, 86 Stat. 1251, and the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. § 901 et seq.) are set forth in the Appendix at Page A1.

STATEMENT.

On July 30, 1957, William Lynn, the decedent, was employed as a longshoreman on board a vessel in navigable waters. He sustained injuries to both legs and one leg was amputated. As a result of these injuries, Lynn was permanently disabled for work as a longshoreman. From July 31, 1957 until the date of his death, Lynn received all disability compensation payments due him under the Longshoremen's and Harbor Workers' Compensation Act. At the time of his injury the Act provided that death benefits were applicable only if the maritime injury was the cause of death.

On December 14, 1975, at approximately 62½ years of age, Mr. Lynn died as the result of a myocardial infarction. There is no evidence that the death was in any way related to the maritime injury. Between the date of the injury and the date of death, the death benefits provisions of the Act were amended to confer benefits for death from causes other than from the disabling maritime injury.

Dorothy Lynn, the decedent's widow, filed a claim for death benefits pursuant to Section 9 of the Amended Act, 33 U. S. C. § 909. Following a formal hearing pursuant to Section 19(d) of the Act, 33 U. S. C. § 919(d), the administrative law judge concluded that the law in effect at the time of Lynn's death governed the claim and issued a compensation order awarding benefits pursuant to the amended Act. The Benefits Review Board affirmed this portion of the administrative law judge's order.

The Court of Appeals affirmed the decision of the Benefits Review Board. The Court followed the decisions of the Courts of Appeals for the Fourth and Second Circuits in ruling that the amendment expanding the availability of Section 9 death benefits applied to the claim presented in this case. The decisions in *Norfolk, Baltimore*

and Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs, 539 F. 2d 378 (4th Cir. 1976), cert. denied, 429 U. S. 1078 (1977) and *State Insurance Fund v. Pesce*, 548 F. 2d 1112 (2d Cir. 1977) were expressly relied upon.

The Court stated that the applicable section of the 1972 Amendments to the Act did not purport to apply only to longshoremen injured after the effective date of the new provisions. It also stated that the legislative history did not show the death benefits conditions were to be so limited.

The Court considered the constitutional argument and it expressed its doubt over the retroactive nature of the legislation. It then held that even assuming the retroactive effect of the legislation, the amendment did not violate due process under this Court's analysis in *Usery v. Turner Elkhorn Mining Co.*, 428 U. S. 1 (1976).

REASONS FOR GRANTING THE WRIT.

This Petition raises substantial questions concerning the interpretation and application of the 1972 Amendment to § 9 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 909, which provides death benefits to the survivors of a permanently and totally disabled maritime worker who dies from causes unrelated to a disabling injury. The application of this Section to workers permanently disabled before the effective date of the 1972 Amendments is an important question of federal law affecting maritime compensation. This Court has not ruled upon the rights and obligations created by this section.

The consideration and interpretation by this Court is urged because of the wide impact decisions under this act have upon maritime compensation law and related areas. Review is particularly appropriate in light of the decision of the Court of Appeals for the Third Circuit which misconstrued this Court's decision in *Usery v. Turner Elkhorn Mining Co.*, 428 U. S. 1 (1976). In ruling that § 9, as presently amended, applied to survivors of those disabled before the effective date of the Act, the Court of Appeals failed to recognize that placing the burden of death benefits upon employers and insurers without compensation in the absence of a clear legislative intent violates the due process clause of the Fifth Amendment. The Third Circuit followed the decisions of two other Courts of Appeals in *Norfolk, Baltimore and Carolina Lines, Inc. v. Director, Office of Workers Compensation Programs*, 539 F. 2d 378 (4th Cir. 1976), cert. denied, 429 U. S. 1078 (1977) and *State Insurance Funds v. Pesce*, 548 F. 2d 1112 (2d Cir. 1977) in interpreting amended Section 9 of the Act in this manner. Since the Third Circuit followed the decisions of the Fourth Circuit and Second Circuit in giving only a

superficial analysis to the critical legislative history of this section, review is needed in order to effectuate the obvious intent of Congress and in order to prevent an unwarranted extension of the death benefits coverage.

In *Usery v. Turner Elkhorn Mining Co.*, this Court instructed that the absence of a clear legislative record manifesting an intent to impose a retroactive obligation for the payment of benefits renders any such legislation constitutionally violative. The legislative history to the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act is devoid of any express legislative intent that an employer and its insurer were to be burdened with death benefits arising from the death of a person already permanently disabled from a cause unrelated to the disabling maritime injury. On the contrary, there was obvious Congressional concern over placing a retroactive burden upon employers. The 1972 amendments reflect this concern by the creation of a Special Fund for easing the burden upon employers for the increased benefits payable to disabled workers. The failure to include such a similar plan for the newly expanded death benefit provision or even to consider the adoption of same is itself indicative of the lack of intent to impose the expanded death benefits provision retroactively.

All longshoremen permanently disabled before the effective date of the 1972 Amendments are affected by this question as are their dependents, their employers and the applicable insurance carriers. Because of the obvious effect of combined decisions of the Court of Appeals for the Third Circuit together with the decisions of the Courts of Appeals for the Fourth and Second Circuits, this Court's consideration is imperative. Without review and clarification by this Court, employers and their insurers will continue to bear an obligation for payments not intended by the Congress and not in accord with the concept of due

process. The continued unwarranted extension of this Compensation Act will have far reaching effects in maritime compensation law and in related areas.

The effect of this decision is not confined to longshoremen and harbor workers. The provisions of the Act are extended by other satellite statutes to all workers in the District of Columbia, on Defense Bases, the Outer Continental Shelf and all projects covered by the Non-Appropriated Fund Instrumentalities Act.

CONCLUSION.

For the foregoing reasons, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

RICHARD R. GALLI,
THOMAS E. BYRNE,
KRUSEN EVANS and BYRNE,
21 South 12th Street,
Philadelphia, Pa. 19107

*Counsel for
Travelers Insurance Company &
Nacirema Operating Company,
Petitioners.*

Appendix.

Title 33, United States Code, Section 909, Longshoremen's and Harbor Workers' Compensation Act, as amended, provides:

"If the injury causes death or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following . . ."

[Letterhead of]

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N. W.
Washington, D. C. 20036

Case No. 77 LHCA-152
OWCP No. 204-290

In the Matter of

DOROTHY LYNN
(Widow of WILLIAM LYNN, deceased)

Claimant

v.

NACIREMA OPERATING COMPANY
Employer
and

THE TRAVELLERS INSURANCE COMPANY
Carrier

Joseph Weiner, Esq.
Lafayette Building, Eighth Floor
Chestnut and Fifth Streets
Philadelphia, Pennsylvania 19106
For the Claimant

T. T. Byrne, Jr.
21 South 12th Street
Philadelphia, Pennsylvania 19107
For the Employer and Carrier

Before: J. F. GREENE, Administrative Law Judge

DECISION AND ORDER.

This matter arises under 33 U. S. C. § 901 *et seq.*, the Longshoremen and Harbor Workers' Compensation Act, as amended, hereafter "the Act" and regulations issued pursuant to authorization contained therein (20 C. F. R. 702.333 *et seq.*).

The claim herein is for death benefits pursuant to § 9 of the Act [33 U. S. C. § 909]; it is respondents' position that they are not liable for such benefits because, although the decedent sustained work-related permanent total disability for which respondents paid compensation until his death in 1975, the injury occurred in 1957 and death was from causes unrelated to the injury; it is argued that any construction of § 9 as amended in 1972 that creates death benefits not in existence at the time of the injury or disability is unconstitutional.

It is stipulated that Mr. Lynn sustained compound comminuted fractures of both legs on July 30, 1957, while working as a longshoreman, and that the left leg was amputated; that respondents voluntarily paid total permanent disability compensation through the date of his death on December 14, 1975; and that the claimant is the widow of the decedent.

It has been held on numerous occasions that the right to compensation under § 9 of the Act is determined as of the date of death rather than the date of injury. The claim for benefits is a separate cause of action belonging to the surviving dependents which arises at the time the injured employee dies, and is distinct from his own prior claim for compensation. The law governing whether death benefits are payable is the law in effect when the claim arises; hence there is no retroactive application, *Rouse v. Norfolk, Baltimore and Carolina Lines, Inc.*,^{*} BRB No. 75-101, 2

* Affirmed, 539 F. 2d 378 (C. A. 4, 1976).

BRBS 11 (June 20, 1975); *Spence v. Terminal Shipping Co.*, BRB No. 74-215, 215 A, 2 BRBS 308, at 315 (September 29, 1975); *Pesce v. Guardino & Sons*, BRB No. 75-303, May 28, 1976; *Egger v. Willamette Iron & Steel Co.*, 2 BRBS 247, 249-50, BRB No. 74-154 (September 3, 1975); *Witthuhn v. Todd Shipyards Corp.*, 3 BRBS 146 (January 8, 1976).

In this case, the law in effect at the time of death was § 9 of the Act as amended, which creates a right to death benefits where, as here, the decedent was permanently totally disabled owing to an employment-related injury, and died from causes unrelated to the injury leaving dependents as described in § 9(b). Accordingly, the application of amended § 9 to this case is in accordance with law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1. The decedent sustained permanent total disability as a result of a work-related injury, while employed by respondent Nacirema Operating Company as a longshoreman on July 30, 1957; respondents paid compensation for permanent total disability based upon the decedent's average weekly wage of \$98.39. The decedent's death from causes unrelated to the injury occurred on December 14, 1975. The weekly rate of compensation on the latter date was \$107.00.

2. The claimant is the widow of Mr. William Lynn within the meaning of the Act, and is entitled to death benefits pursuant to 33 U. S. C. 909(a), (b), and (e), consisting of (1) reasonable funeral expenses not exceeding \$1000, and (2) total weekly benefits of 50% of the average weekly wage of the deceased, which shall be considered to have been not less than the applicable national weekly wage as prescribed in § 6(b) of the Act, 33 U. S. C.

906(b), to the extent that such total weekly benefits do not exceed the average weekly wage of the deceased. The national average weekly wage at the time of death (\$159.19) is used in determining the weekly benefit, *MacDonald v. Albina Engine & Machine Works*, 75 LHCA 445, since the surviving dependant's rights are determined by the law in effect at the time of the decedent's death, *Rouse, supra*.

3. The claimant is entitled to total weekly benefits of \$79.59 and to the sum of \$1000 for reasonable funeral expenses.

4. Counsel for claimant having not filed a request for fees in the manner prescribed by § 28 of the Act, 33 U. S. C. 928, no award can be assessed against respondents at this time.

5. Respondents' controversion of the claim was timely.

ORDER.

1. It is therefore ORDERED that respondents shall pay to Mrs. Dorothy Lynn the sum of \$1000 for reasonable funeral expenses.

2. It is further ordered that, subject to the applicable limitations and provisions of the Act, respondents shall pay to Mrs. Dorothy Lynn compensation at the weekly rate of 50% of the national average weekly wage in effect at the date of Mr. Lynn's death on December 14, 1975, starting December 15, 1975, and continuing during her widowhood.

3. Leave is hereby granted for counsel for claimant to file a request for fees in conformity with § 28 of the Act. It is further ordered that any such request be filed within ten days of receipt of this order and that a copy of such

request be served upon respondents for their comment within the same period. Any comment respondents may wish to make shall be filed within one week of receipt of the request for fees.

*/s/ J. F. GREENE
Administrative Law Judge*

Dated: January 30, 1977
Washington, D. C.

[Letterhead of]

**U. S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
Washington, D. C. 20210**

—
**Benefits Review Board
BRB No. 77-225**
—

**DOROTHY LYNN, Widow of WILLIAM LYNN
Claimant-Respondent**

v.

**NACIREMA OPERATING COMPANY
and**

**THE TRAVELERS INSURANCE COMPANY
Employer/Carrier-Petitioners**

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

—
DECISION.

**Filed as Part of the Record
July 18, 1977**

**Susan Rambo by MX
(Clerk)**

—
**Appeal from the Decision and Order of J. F. Greene,
Administrative Law Judge, United States Department of Labor.**

Joseph Weiner (Freedman, Lorry, Vigderman, Weiner and Sovel), Philadelphia, Pennsylvania, for the claimant.

T. E. Bryne, Jr. (Krusen, Evans and Bryne), Philadelphia, Pennsylvania, for the employer/carrier.

Linda L. Carroll (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D. C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

MILLER, Member:

This is an appeal by the employer/carrier (hereinafter, the employer) from a Decision and Order (77-LHCA-152) of Administrative Law Judge J. F. Greene awarding claimant death benefits and a Supplemental Decision and Order awarding attorneys fees to claimant's counsel in a case arising under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. § 901 *et seq.* (hereinafter referred to as the Act).

Claimant's late husband sustained compound comminuted fractures of both legs, resulting in the amputation of one of his legs, while working as a longshoreman on July 30, 1957. Employer voluntarily paid benefits for permanent total disability through December 14, 1975, when claimant's husband died of causes unrelated to the 1957 injuries.

The employer challenges the administrative law judge's award of death benefits to claimant, pursuant to Section 9 of the Act, 33 U. S. C. § 909, contending that

to so apply amended Section 9 to cases in which permanent total disability commenced prior to the time of the 1972 Amendments, and death from unrelated causes occurred after, would amount to a retroactive application of the law which would deny employer due process of law, and would also exceed the limits of Congress' authority to alter or revise the maritime law, due to the lack of a maritime nexus between the widow's claim, the cause of decedent's death, and the original maritime injury.

The Board has consistently upheld the application of amended Section 9 in many previous cases presenting precisely the same issue. See *Rouse v. Norfolk, Baltimore and Carolina Lines, Inc.*, 2 BRBS 11, BRB No. 75-101 (June 20, 1975), *aff'd sub nom. Norfolk, Baltimore and Carolina Lines, Inc. v. Director OWCP*, 539 F. 2d 378 (4th Cir. 1976), *cert. denied*, — U. S. —, 97 S. Ct. 823 (1977); *Pesce v. Guardino & Sons*, 4 BRBS 36; BRB No. 75-303 (May 28, 1976), *aff'd sub nom. State Insurance Fund v. Pesce*, 548 F. 2d 1112 (2d Cir. 1977); *Witthuhn v. Todd Shipyards Corp.*, 3 BRBS 146, BRB No. 75-157, 157A (Jan. 8, 1976); *Spence v. Terminal Shipping Co.*, 2 BRBS 308, BRB No. 74-215, 215A (Sept. 29, 1975). We see no reason for repeating our reasoning in those cases here.

Accordingly, the Board affirms the Decision and Order of the Administrative Law Judge awarding Section 9 death benefits to claimant.

In its appeal from the Supplemental Decision and Order of the administrative law judge, employer contends that the award of attorneys fees made therein was not based on a complete statement of the extent and character of the necessary work performed as required by 20 C. F. R. § 702.132.

The petition for attorneys fees submitted to the administrative law judge reads in pertinent part:

FEES

Preparation for informal conference set for July 30, 1976 and attendance of said conference \$300.00

Preparation of Memorandum of Law, Preparation of Stipulation of Facts and attendance at Administrative Law Judge Hearing on January 3, 1977... \$1,000.00

The above costs have been predicated on current standards for counsel in the metropolitan Philadelphia area.

In *Atlantic & Gulf Stevedores, Inc. v. Salzano*, 542 F. 2d 602, 610 (3rd Cir. 1976), cited by employer in its brief, it was held that

Disclosure of the hours devoted to each category of work in connection with the appeal and the reasonable hourly rate for the person performing the work is an essential element of every application [for an award of attorneys fees].

The Board concludes that the form of the fee request submitted by claimant's counsel comports neither with the requirements of the regulations, 20 C. F. R. § 702.132, nor the standards articulated in *Salzano, supra*. The mode of request fails to provide any indication of the amount, in terms of time expended, of the "... actual necessary work performed", 20 C. F. R. § 702.132, nor does it indicate the hourly rate for the person or persons performing the various categories of work listed in the application.

Accordingly, the Board vacates the award of attorneys fees contained in the Supplemental Order of the admin-

istrative law judge and remands this matter to the Office of Administrative Law Judges for a re-determination of the attorneys fees due claimant's counsel based upon a proper application therefor in accordance with this opinion.

/s/ JULIUS MILLER
Julius Miller, Member

We Concur: /s/ RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

/s/ RALPH M. HARTMAN
Ralph M. Hartman, Member

Dated this 18th day
of July, 1977

STIPULATION OF FACTS.

It is stipulated by and between counsel for the claimant and counsel for the employer and its insurance carrier as follows:

1. The decedent, William Lynn, was born May 13, 1913, in Philadelphia, Pennsylvania.

2. The claimant, his widow, Dorothy Lynn, was born June 29, 1914, in Philadelphia, Pennsylvania.

3. Mr. and Mrs. Lynn were married in Wilmington, Delaware on April 1, 1944.

4. On July 30, 1957, the decedent, while employed as a longshoreman by Nacirema Operating Company, aboard a vessel in the Port of Philadelphia, while working in a lower hold was caught between a draft of steel and the shaft alley of the ship as the result of which he sustained a compound comminuted fracture of the right femur and a similar injury to the left leg. A below-knee amputation was performed on the left leg.

5. The insurance carrier for the employer voluntarily paid the employee's compensation for permanent total disability from July 31, 1957 to December 14, 1975.

6. The decedent died on December 14, 1975, while still receiving benefits for permanent total disability.

7. At the time of the decedent's death, the marriage between the decedent and the claimant was valid and subsisting.

8. There are no minor dependent children surviving.

9. The decedent's widow, the claimant herein, filed a claim for death benefits on her own behalf on June 23, 1976.

10. Until the time of the decedent's death, he received compensation for total permanent disability.

11. As of the date of death in 1975, the rate of the weekly compensation payments was \$107.00.

12. The burial and funeral expenses amounted to \$1,691.00.

13. The widow is making claim under Section 9 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Section 909, as amended, effective November 26, 1972.

14. The employer and its insurance carrier has controverted the widow's claim for benefits.

15. The District Office of Workers Compensation Programs, following a conference on July 20, 1976, recommended on July 27, 1976, that the carrier pay benefits to the employee's widow in accordance with Section 9 of the Act as well as reasonable funeral expenses not exceeding \$1,000.00.

16. The employer and its insurance carrier did not make payment pursuant to this recommendation and the District Office recommended the matter for formal hearing on October 27, 1976.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2195

NACIREMA OPERATING COMPANY and THE
TRAVELERS INSURANCE COMPANY,
Petitioners,
v.

DOROTHY LYNN and THE DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

ON PETITION FOR REVIEW FROM THE BENEFITS REVIEW
BOARD; U. S. DEPARTMENT OF LABOR
(BRB No. 77-225)

Argued May 2, 1978

BEFORE HUNTER, WEIS, *Circuit Judges*, and COHEN,
District Judge.^{*}

T. E. BYRNE
Krusen, Evans and Byrne
21 South 12th Street
Philadelphia, PA 19107

CARIN A. CLAUSS
Solicitor of Labor
LAURIE M. STREETER
Associate Solicitor
LINDA L. CARROLL
U. S. Department of Labor
200 Constitution Ave., N.W.
Washington, D. C. 20210
Attorneys for Respondent,
Director, Office of Workers'
Compensation

* Honorable Mitchell H. Cohen, United States District Judge
for the District of New Jersey, sitting by designation.

JOSEPH WEINER
Freedman and Lorry
5th and Chestnut Streets
Philadelphia, PA 19106

Attorneys for Petitioners

Attorney for Respondent,
Dorothy Lynn

OPINION.

(Filed June 5, 1978)

PER CURIAM

Nacirema Operating Co. and its insurance carrier, Travelers Insurance Co., petition for review of a decision of the Benefits Review Board, United States Department of Labor, BRB No. 77-225, 6 BRBS 314 (1977). The claim involved in the decision arose from the death of William Lynn. Mr. Lynn was permanently and totally disabled by a 1957 injury related to his employment as a longshoreman. Nacirema was required to pay disability compensation until his death in December of 1975. The cause of the death was unrelated to his injury. Mr. Lynn's wife filed a claim for widow's death benefits under section 9 of the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, 33 U. S. C. § 909 (Supp. V 1975). The administrative law judge concluded that the law in effect at the time of the longshoreman's death governed the claim and issued a compensation order awarding death benefits under the amended Act. The Benefits Review Board affirmed the award. We have jurisdiction over this petition under section 21(c) of the Act, 33 U. S. C. § 921(c) (Supp. V 1975).¹

1. Although the decision of the Benefits Review Board in part reversed and remanded the case for reconsideration of the award

Between the time of Mr. Lynn's injury and his death, Congress altered the conditions under which death benefits would be awarded under the Act by adding to section 9 the language which we have emphasized:

If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the amount to or for the benefit of the person following:

33 U. S. C. § 909 (Supp. V 1975) (incorporating 1972 amendment, Pub. L. No. 92-576, § 5(d), 86 Stat. 1253). Since Mr. Lynn's death occurred from causes unrelated to his longshoring injury, death benefits would be payable only because of the amendment.

The petitioners argue that the 1972 Amendment to section 9 was not intended to apply to longshoremen who had previously ceased work because of work-related injury. They also contend that, if applied to the facts of this case, the amendment is unconstitutional on the grounds that it is impermissibly retroactive legislation and lacks the required nexus to maritime commerce.

These same contentions were rejected by the Court of Appeals for the Fourth Circuit in *Norfolk, Baltimore and Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs*, 539 F. 2d 378 (4th Cir. 1976), cert. denied, 429 U. S. 1078 (1977). Finding that the amend-

1. (Cont'd.)

of attorney's fees, this remaining issue was settled and an appropriate order entered by the administrative law judge. Under these circumstances, the order of the Board is final, as required by 33 U. S. C. § 921(c) (Supp. V 1975). *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs*, 540 F.2d 629, 631 n. 1 (3d Cir. 1976).

ment applied to longshoremen who were injured prior to 1972 and who died of causes unrelated to the injury after that year, the court held that whatever retroactive effect death benefits might have was constitutionally permissible. The court also ruled that the amendment's goal of assuring indemnification of survivors of injured maritime workers was clearly within congressional powers, *see Crowell v. Benson*, 285 U. S. 22 (1932). Whether understood as an increase in the benefits due the injured worker or as an expansion of the "casual clause" of the original act, the amendment withstood constitutional scrutiny.

The *Norfolk* case was followed by the Court of Appeals of the Second Circuit in *State Insurance Fund v. Pesce*, 548 F. 2d 1112 (2d Cir. 1977). The court first indicated doubt whether the amendment, as applied to a pre-existing injury, was in any way retroactive. Death benefits were said to be separate and distinct from the right to disability benefits. The right to death benefits does not vest until the time of death. *International Mercantile Marine Co. v. Lowe*, 93 F. 2d 663 (2d Cir.), cert. denied, 304 U. S. 565 (1938), followed in *Norton v. Travelers Insurance Co.*, 105 F. 2d 122 (3d Cir. 1939). To the extent that the amendment was argued to be retroactive in altering the conditions for entitlement to death benefits, the court extensively quoted from and adopted the analysis of the Fourth Circuit and held the amendment to be constitutional.

We are in accord with the decisions and rationale of the Second and Fourth Circuits. We hold that the amendment expanding the availability of section 9 death benefits, contained in section 5(d) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1253, applies to the claim involved in this case. Cf. *C & P Telephone Co. v. Director, Office of Workers Compensation Programs*, 564 F. 2d 503,

510 (D. C. Cir. 1977) (applying 1972 amendments to 33 U. S. C. § 908(f) to claim for pre-1972 injury); *Cooper Stevedoring of Louisiana, Inc. v. Washington*, 556 F. 2d 268, 271-77 (5th Cir. 1977) (same, amendments to 33 U. S. C. § 913(a)); *Penn Jersey Welding Co. v. Lowe*, 183 F. 2d 936 (3d Cir. 1940) (applying 1948 amendments to section 9 death benefits, Act of June 14, 1948, ch. 623, 62 Stat. 602, to claim premised on prior injury). Section 5(d) of the Amendment does not purport to apply only to longshoremen who were injured after the effective date of new provisions, in contrast to section 20, for example, which contains an explicit limitation. Our review of the legislative history does not show that the conditions for death benefits were restricted in the manner suggested by petitioners.

The employer and insurance carrier rely largely on *Railroad Retirement Board v. Alton Railroad Co.*, 295 U. S. 330 (1935), in support of their contention that the amendment to section 9 of the Act is unconstitutionally retroactive. Like the Second Circuit, we doubt whether the legislation before us is retroactive. Even assuming retroactive effect, we believe that the amendment does not violate due process under the analysis of *Alton* as explained by the Supreme Court in *Usery v. Turner Elkhorn Mining Co.*, 428 U. S. 1, 14-20 (1976). We find that the amendment is reasonably related to the permissible goal of indemnifying survivors of injured maritime workers. This conclusion also supports our finding that Congress had the authority to provide the benefits under its maritime power. See generally *Crowell v. Benson*, *supra*; *Dravo Corp. v. Maxin*, 545 F. 2d 374, 377-79 (3d Cir. 1976), cert. denied, 433 U. S. 908 (1977).

The petition for review will be denied, and the order of the Benefits Review Board will be affirmed.

**United States Court of Appeals
FOR THE THIRD CIRCUIT**

—
No. 77-2195
—

NACIREMA OPERATING COMPANY AND
THE TRAVELERS INSURANCE COMPANY,
Petitioners,

v.

DOROTHY LYNN AND THE DIRECTOR, OFFICE
OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

—
SUR PETITION FOR REHEARING
—

Present: HUNTER and WEIS, *Circuit Judges*, and
COHEN, *District Judge*

The petition for rehearing filed by Petitioners in the above entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By THE COURT,

/s/ JAMES HUNTER, III
James Hunter, III, Judge

Dated: June 28, 1978